

[Francis v. Bogan, Inc.](#), 86-ERA-8 (ALJ Mar. 21, 1986)

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Case No. 86-ERA-8
Date: March 21, 1986

In the Matter of

ALBERT FRANCIS
Claimant

v.

BOGAN, INC.
Respondent

Appearances:

James J. Katz, Esq.
For the Claimant

Charles W. Boohar, Esq.
For the Respondent

Before: Paul H. Teitler
District Chief Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding arises under Section 210 of Title II of the Energy Reorganization Act of 1974, codified at 42 U.S.C. Section 5851. That section prohibits employers from discriminating against an employee who commences a proceeding for the administration or enforcement of the Act or the Atomic Energy Act of 1954, as amended.

A formal hearing was held on December 19, 1985 in Camden, New Jersey. All parties were given full opportunity to present evidence and to examine and cross-examine witnesses as provided in the Act and the regulation issued thereunder. The parties were also given an opportunity to submit post-hearing briefs and reply brief. This decision follows the termination of the formal hearing, and it is based on the entire record.

PROCEDURAL HISTORY

This proceeding was commenced by a September 11, 1985 letter in which the Claimant, Albert L. Francis, charged that Bogan, Inc. unlawfully demoted him from supervisor to technician. (Exhibit 1). Subsequent efforts at conciliation failed and the Area Director of the United States Department of Labor, Employment Standards Administration, entered a notice of determination on October 18, 1985. (Exhibit 1). The Area Director found that "Mr. Francis was demoted from foreman to technician and threatened with job loss if he talked to the Nuclear Regulatory Commission."¹ (Exhibit 1).

Bogan, Inc., timely filed a telegram appealing the findings of the Area Director. (Exhibit 2). A hearing was subsequently held on December 19, 1985.

FINDINGS OF FACT

BACKGROUND FINDINGS

This case concerns incidents occurring at the Hope Creek Nuclear General Station in Salem, New Jersey. The Plant is owned by Public Service Electric and Gas (PSE & G). (Transcript 11). Bogan, Inc. performs work at the Hope Creek site under seven separate contracts. (Brief for Employer 2). The incidents in question here arose under Bogan's contract

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"to provide supplemental instrumentation and control ("I & C") testing services." (Brief for Employer 2).

Mr. Francis, who worked as a supervisor and an instrument technician for various employers between 1966 and 1981, (Transcript 14-15, Claimant's Exhibit 1), was one of the first two technicians hired by Bogan on the Hope Creek site. (Transcript 18). Mr. Francis was hired as an Instrument Technician Level I on June 17, 1984. (Transcript 16 and 23). He was promoted to supervisor on the walk down crew in August 1984, and was

then certified as an Instrument Technician Level II. (Transcript 16-17). Mr. Francis continued in this post until April, 1985. (Transcript 19).

In April, 1985, Mr. Francis left his supervisory post to become a technician again. Mr. Francis testified that he wanted to work with his tools and he wanted to work on the night shift. (Transcript 19). Mr. Francis remained a technician for two to three weeks, then he "filled in for a supervisor that was going on vacation and about the time that ended, they started another crew on nights and asked me to be supervisor on that crew." (Transcript 19). Mr. Francis remained in that supervisory position from May to August 24, 1985. (Transcript 103). On August 24, 1985, Mr. Francis was demoted to technician and assigned to the tagging crew on the day shift. (Transcript 68). He subsequently opted to stay on the night shift for six to eight weeks. (Transcript 82). At the hearing, Mr. Francis stated that he still works for Bogan at the Hope Creek site. (Transcript 11).

ULTIMATE FINDINGS

The gist of Mr. Francis' complaint lies in his disagreement with his employer, Bogan, Inc., over the reason for his demotion on August 24, 1985. Bogan, Inc., maintains that the Claimant was demoted for legitimate business reasons, including "productivity, continuing or solving problems that were arising and holding test packages, observation or knowing where his technicians were, working close in hand with his technicians, coordination with the coordinators and start-up engineers." (Transcript 204). Mr. Francis claims that he was demoted "because of his unwillingness to sign off on test packages that did not meet standards established either by the utility's procedures or by NRC regulations, his aggressive concern with plant safety, and his insistence that work

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packages be properly tested pursuant to established procedure." (Brief for the Claimant 2).

Based on an examination of the record taken as a whole, I make the following findings of fact:

As a supervisor on the night shift, the claimant received work packages from the systems test engineer. (Transcript 24). A work package contains "all of the information that the technician needs or reference to the information. Also the values that he needs to calibrate the instrument to, on a calibration sheet, and the required tolerances he is allowed to be in error on the device. The work packages usually include a procedure, Which he is supposed to follow, in calibrating the instrument." (Transcript 23).

Mr. Francis testified that a "supervisor would receive the work package from the work coordinator, check it over for any obvious problems and then assign it to a technician. When the technician was through with it, he would return it to the supervisor. The supervisor would check through on all of the data that had been placed into the package

by the technician, make sure that his test equipment was accurate enough to meet the specifications, and then he would sign it off." (Transcript 24).

When asked "What do you do if the procedure that you are given in the work package is not appropriate?" Mr. Francis stated "then, if you have determined that the procedure is not appropriate, you do not even attempt the calibration. You have to have something to go by, to do the calibration. You would then turn the package back in, but for that you would get no credit." (Transcript 26). Between May and August of 1985, Mr. Francis "frequently" returned deficient test packages. (Transcript 48). Mr. Francis further stated that his supervisors were "displeased with the number [of packages being returned] -- especially when [he] was turning one back in when they were doing the work on other shifts. They were going ahead and doing the packages anyway." (Transcript 107).

Dave Davis, the night shift testing coordinator between

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May and August 1985, (Transcript 123), tracked the test packages; he assigned the packages to Mr. Francis and other supervisors (Transcript 124) and reviewed the packages to ensure that they were "done and done properly." (Transcript 123). At the hearing, Mr. Davis testified that "the test packages were -- you know, putting it mildly, they were in a sad state of affairs when we received them. (Transcript 135). Mr. Davis further testified that "we had data that was irrelevant, erroneous, we had test packages that included the wrong procedures, we had test packages that devices were not even installed out in the field, that shouldn't even have been released for test at the time." (Transcript 135 - 136).

Mr. Francis testified at the bearing that he anticipated "problems" because he was returning many uncompleted test packages. (Transcript 69). Mr. Francis expected problems for two reasons. First, "because the other supervisors went ahead and [did] the work, if I turned [the package] back in, then, in effect, if I was right, it made him look bad." (Transcript 108). Second, "there was pressure to finish so many [packages], to complete so many instruments. They kept track of all of the instruments being completed and they expected you to keep the efficiency production up, regardless of the quality." (Transcript 108). Bogan established no quota of jobs to be done each evening (Transcript 30, 130, 249), but did establish "target completion dates" for each work package. (Transcript 108). These target dates were not compulsory. (Transcript 109).

While working as a supervisor, Mr. Francis also filed several field questionnaires. A field questionnaire is Bogan's "vehicle for anyone addressing any concerns they have with the plant. Anyone working there can generate a field questionnaire, asking any question they have about anything in the plant." (Transcript 36). An individual writes a field questionnaire and submits it to his department head. "If he approves it, then it will go to the field questionnaire coordinator, who will then assign it to the appropriate crew it

should go to within the utility's structure." (Transcript 36). The field questionnaire is "reviewed by site engineering, a response comes back to the originator [of the field

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questionnaire] and he approves or disapproves of the disposition. And if he disapproves of it, it has to go back to site engineering, and the process will then continue until some agreeable solution can be reached." (Transcript 172).

Mr. Francis filed five field questionnaires. The first field questionnaire was submitted on August 7, 1984. This document identified three instruments in the diesel fuel oil storage and transfer system and stated "there is inadequate information available for calibration and maintenance of the above instruments." (Exhibit D-4). The final disposition of this field questionnaire referred to certain vendor prints containing the necessary information. Mr. Francis marked this disposition unacceptable because "the vendor information provided ... does not provide detail for calibration and maintenance." (Exhibit D-4). The field questionnaire consequently went back to site engineering and received a final redistribution referring to another vendor print for the information requested. This disposition was marked acceptable by Ed Jones on November 14, 1984.

Mr. Francis filed another field questionnaire on August 21, 1984. This document concerned the domestic water system and stated that the "temperature controls for the hot water tanks OAE-509 and OBE-503 are mounted on the backside of the tanks within inches of the wall. Accessibility to these instruments will be extremely difficult." (Exhibit D-6). The interim disposition, which became the final disposition, stated "while access to the tank controllers is somewhat awkward, site engineering feels that in the interest of expenditures necessary to move the equipment, a small reflecting tool may be used to read the settings and gauges." (Exhibit D-6). This disposition was marked acceptable by Mr. Francis on March 19, 1985.

Mr. Francis filed another field questionnaire on October 23, 1984. This field questionnaire concerned the condensate storage and transfer system. Mr. Francis wrote that certain instruments "have been installed on the low pressure side of the DP transmitter plug. The low side must be vented for this type application, and should have vent tube installed. The referenced instrument mounting drawing J-G1012-2 detail "D" used for this installation does not specify what to

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do with the low press side when a [DP transmitter] is used." (Exhibit D-5). The final disposition noted "Bechtel agrees the low pressure side of the DP transmitter should not be plugged. This system has been T/O to PSE&G. This instrument problem should be given to PSE&G start-up for their action." (Exhibit D-5). On December 4, 1984, Mr. Francis marked this disposition unacceptable because "FCR J613 was incorporated into

the general installation notes, under the section for valves. It addresses the use of 5 valve manifolds in place of 2 valve manifolds, when used on level installations. By random check of two future installation[al I see nothing that details the venting of the low side." There was a redistribution of this field questionnaire which noted "an FCR (J746) has been issued to add a note to JG1003 for venting" DP transmitters. (Exhibit D-5). This redistribution was marked acceptable by Mr. Francis on January 8, 1985.

The Claimant filed a fourth field questionnaire on November 14, 1984. (Exhibit D-3). In this document, Mr. Francis stated "instrument sensing lines that run in high radiation areas are being installed with compression type unions, instead of welded fittings as specified on the installation drawing." "Please verify if welded connections must be used. The five installations given are only examples and the practice is extensive throughout the plant." (Exhibit D-3). The final disposition indicated that "project engineering has given approval to the field (Bechtel Engineering) to substitute welded fittings with flareless fittings several years ago." This disposition was marked acceptable by Ed Rush on November 30, 1984.

On January 15, 1985, Claimant filed a field questionnaire concerning the location of a metal support brace near a motor control center (MCC). (Exhibit C-4). In this document, Mr. Francis stated "a pipe hanger has been installed approximately twelve inches in front of MCC 10B232. This does not conform to working clearances specified in the National Electrical Code, Article 110-16. This also will be a *safety hazard* to personnel working on any surrounding cubicles. Required clearances should also be addressed by IEEE standard 241."

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(emphasis in original). The final disposition stated "Firstly, the standards to which Hope Creek must conform are all listed in the FSAR Table 3.2-1, of which the primary one is ANSI N45.2.4 which has recently been outdated/superseded by IEEE 336. IEEE 241 (commercial buildings) and NEC do *not* govern [Hope Creek]. However, IEEE 141, Table 55, and OSHA, subpart S, Section 1910.303(i), Table S-1 to which we must conform, agree with your contention that 12" working clearance is not adequate. Each requires two and one half feet for this application. Engineering suggests an SDR² be generated to initiate a change." (Exhibit C-4). Mr. Francis marked this disposition acceptable on February 13, 1985.

Although the MCC problem was not rectified immediately, Mr. Francis took no further action until August, 1985. At the hearing, Mr. Francis explained why he took no action between February and August. Ed Rush told the Claimant that the SDR should be written by the engineer, not by Mr. Francis. (Transcript 274). Mr. Francis was also told that an SDR was being generated. (Transcript 275). Finally, Mr. Francis took the field questionnaire "to the electrical inspector that was responsible for this, presented him with a copy. He took it to Bechtel and later, through a phone conversation, he assured me it was being worked on." (Transcript 275).

In the middle of August 1985, Mr. Francis "noted that they were starting the testing on this particular MCC and I knew that somewhere along the line I had to bring it to someone else's attention." (Transcript 42).

During a GET training session, Mr. Francis went into the instructor's office to seek advice on solving the MCC problem. Mr. Francis testified that the instructor told him "at that time that -- he was a little hesitant as to what I should do after he found out all I had done but he said that if I mentioned it to an NRC inspector, then I would get some action taken on it. And I asked him if they had -- if those people were assigned there to the plant and he said, yes, there were two or three on site all the time, and their offices were in the Administration Building." (Transcript 42).

The next day, August 23, Mr. Francis "approached Ed Rush

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up in the supervisors' offices and told him that we were going to have to take further action on this, and nothing was being done on it." (Transcript 43). Mr. Francis testified that he had "really decided I just couldn't let this go, I made that clear back when I wrote the field questionnaire, that this one had to be fixed. And I would have taken it to the NRC. I intended to take it to their safe team [sic] in the NRC." (Transcript 43; Transcript 106).

Mr. Francis was demoted the following day, August 24, 1985. Robert Class, the site project manager, (Transcript 241), informed Mr. Francis that he was being demoted. He gave the following account of the conversation he had with the Claimant at that time:

Al, there is no easy way of doing this or saying this, so I'll just say it. You are being demoted from a supervisor back to a technician at the end of your shift today, you will no longer function as a supervisor. Monday you will report on the day shift in the tagging crew.

And his response was, okay, but why. And I says, well, because of low productivity, you don't have control of your people, they seem to run you. Too many packages being returned, and not being -- being returned to start-up. Too many packages on hold. Just did not seem to be with the program.

And his statement at that point was, well, you know, this isn't the end of this, And I says, well, Al, I would caution you as to what you do. Be very careful. Don't go out and stir up the technicians or anything like this because it could possibly cost you your job.

And he says, oh, no, no, no, no. I wouldn't do that. And he says, I am going to go to the NRC. And I says, what's the NRC got to do with all of this? And he says, well, I am going to bring some charges up to the NRC. (Transcript 245-246).

On August 26, 1985, Mr. Francis went to the SAFETEAM, which "is an independent group that is on site, supposedly to allow workers or anybody to raise safety questions that would effect the plant." (Transcript 46). The SAFETEAM responded

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to Mr. Francis' concerns in a letter dated October 28, 1985. (Exhibit C-6). This letter discussed the Claimant's concerns about test packages, as well as his concern about the MCC problem. With respect to the MCC problem, the SAFETEAM letter stated "SAFETEAM performed an initial walkdown with PSE&G Quality Assurance Personnel to identify the location and unique identity number for each MCC in question." "The interfering supports were cable tray and conduit unistrut supports, not pipe supports as mentioned in the concern." (Exhibit C-6).

With respect to Mr. Francis' concerns about the test packages, the SAFETEAM performed an analysis of each package the Claimant mentioned. For package # GKC-D176 the SAFETEAM found that "the procedure was improper" and "the required data sheets did not accompany the package." (Exhibit C-6). For package # GJC-0062, the SAFETEAM noted "the responsible Startup Test Engineer voided the package on September 12, 1985 because the calibration values did not agree with the calibration requirements." (Exhibit C-6). For package # AFC-0027 the SAFETEAM noted that Mr. Francis had correctly recognized that two transmitters originally had been tagged incorrectly. This problem had been identified in an SDR. The test package Mr. Francis mentioned, however, was not the package for testing the two transmitters in question. (Exhibit C-6). For package # GSC-0194, the SAFETEAM noted that an SDR had been generated to deal with the problem that Mr. Francis had identified. (Exhibit C-6). For package # GKC-0044, the SAFETEAM noted that the package had been voided on August 5, 1985 because, as Mr. Francis had noted, the instruments could not be calibrated with the required accuracy. (Exhibit C-6). For package # ORB FT-N120 the SAFETEAM noted "This is not a test package number, it is a component number." The SAFETEAM also noted "This test package (HBC-0424) has been completed and final review was accepted and signed off September 13, 1985." (Exhibit C-6).

The SAFETEAM also responded to other concerns raised by Mr. Francis. Mr. Francis "stated that all Westinghouse Controllers are equipped with input/output conditioners that require an accuracy measurement of 0.016 Milliamps. You stated these conditioners were calibrated with equipment that did not meet specifications. You felt the accuracy level was too high anyway." The SAFETEAM reported "the I & C supervisor for PSE&G informed the SAFETEAM that SDR GK-0206 was issued on July 25, 1985 to resolve this condition. The

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SDR stated that the available test equipment was adequate for calibration adequacy." (Exhibit C-6).

On August 27, 1985, Mr. Francis took his concerns to the NRC. (Transcript 44). The NRC, in a letter dated September 6, 1985, informed Mr. Francis that it would investigate his concerns and allegations. (Exhibit C-5). Mr. Jack Strosnider of the NRC, in testimony at the hearing, stated that the NRC was still "preparing some comments" as a result of its investigation. When asked "in light of the fact that some packages had to have calibration changes made in them, would you say that Mr. Francis' concerns as were raised here, were reasonable?" Mr. Strosnider replied "Yes". (Transcript 164).

CONCLUSIONS OF LAW

The Energy Reorganization Act of 1974, as amended, provides, in pertinent part:

No employer, including a Commission licensee, an applicant for a Commission license, or a contractor or a subcontractor of a Commission licensee or applicant, may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) --

(1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C.A. Section 2011 et seq.], or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;

(2) testified or is about to testify in any such proceeding or;

(3) assisted or participated or is about to assist or participate in any manner in such a proceeding or, in any other manner, in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C.A. Section 2011 et seq.]

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To establish a *prima facie* case of unlawful discrimination, a Claimant must prove "(1) that the party charged with discrimination is an employer subject to the Act; (2) that the complaining employee was discharged or otherwise discriminated against with respect to his compensation, terms, conditions, or privileges of employment; and (3) that the alleged discrimination arose because the employee participated in an NRC proceeding under either the Energy Reorganization Act of 1974 or the Atomic Energy Act of 1954." *DeFord v. Secretary of Labor*, 700 F.2d 281, 286 (6th Cir. 1983).

The parties stipulated at the hearing that the employer is a covered employer under the Act (Transcript 5) and that the employee is a covered employee under the Act. (Transcript 5). Based on an examination of the record, I find these stipulations to be reasonable.

There is no doubt in this case that the employer changed the Claimant's compensation or conditions of employment by demoting him from supervisor to technician. The issues in this case are (1) whether Mr. Francis engaged in statutorily protected activity and (2) whether Bogan's decision to demote Mr. Francis was motivated by his participation in protected activity.

The Claimant argues that the language of subsection (a) (3), which prohibits employers from discriminating against employees who assist or participate "in such a proceeding or *in any other action* to carry out the purposes of this chapter" (emphasis added), protects employees who file internal corporate safety-related complaints. The Respondent argues that the protection afforded by the statute is triggered by participation in an NRC proceeding; filing a purely internal corporate safety-related complaint is not a protected activity under the statute.

On the facts of this case, I find it unnecessary to reach the issue framed by counsel. Subsection (a)(1) clearly prohibits discrimination against an employee who

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"*is about to* commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954" (emphasis added). The Claimant stated that he was "determined" to get the MCC problem fixed, and that he "would bring that forward to the NRC or the OSHA" - even at the cost of his own job. (Transcript 114). Mr. Francis also stated at the hearing that on August 22, he was told that he should go to the NRC to get action on the MCC problem. On August 23, Mr. Francis told Ed Rush -- the PSE&G supervisor on the walk-down crew (Transcript 43) -- that further action needed to be taken to correct the MCC problem. On August 24, immediately after being informed of his demotion, Mr. Francis clearly stated that he was going to go to the SAFETEAM and the NRC. (Transcript 245).

At the hearing, Mr. Davis testified that he believed "Al Francis would have definitely taken some other action, some corrective action. Yes, I think that he would have approached OSHA or some other governmental concern." (Transcript 138-139).

Based on my observation of the witnesses' demeanor at the hearing, I find the testimony of Mr. Davis and Mr. Francis to be credible. I find that Mr. Francis was a dedicated, competent individual who testified and reported safety-related problems. The SAFETEAM report and the testimony of Mr. Strosnider, as well as the testimony of Mr. Davis, indicates that many of the problems Mr. Francis reported were, in fact, reasonable and valid concerns. I therefore give the Claimant's testimony considerable weight.

Based on the foregoing and considering the record taken as a whole, I find that the weight of the evidence shows that Mr. Francis, at the time of his demotion, was about to go to the NRC personnel on the Hope Creek site to get action on the MCC problem.

Because subsection (a)(1) clearly protects employees who are about to commence an NRC action, I find that Mr. Francis was engaged in statutorily protected activity.

In order to prove a discrimination claim under the Energy Reorganization Act of 1974, as amended, a Claimant must also show that the employer's action occurred *because* the

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employee engaged in a statutorily protected activity. The analysis adopted by the United States Supreme Court in *Mt. Healthy City School District v. Doyle*, 429 U.S. 274, 97 S. Ct. 568, 50 L.Ed.2d 471 (1977), has been applied in discrimination cases under the Energy Reorganization Act of 1974. *Consolidated Edison Co. of NY, Inc. v. Donovan*, 673 F.2d 61 (2nd Cir. 1982); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159 (9th Cir. 1984). Under the *Mt. Healthy* analysis, a Claimant must show that protected activity was a "motivating factor" in the employer's decision.

Mr. Francis admits that no representative of Bogan, Inc. ever told him that he was demoted because of his intention to go to the SAFETeam or the NRC. (Transcript 94). Bogan, through Dave Davis - Mr. Francis' supervisor between May and August 1985 - knew that the Claimant intended to go to the NRC. The timing of the events in question - the GET training on August 22, the conversation between the Claimant and Ed Rush on August 23, and the demotion on August 24 - certainly supports the inference that Mr. Francis was demoted because he was about to go to the NRC. That inference is further supported by the statement of Robert Class that "if you go to those people and stir up any problems, you will lose your job." (Transcript 69). Mr. Francis believed that Mr. Class was referring to his intention to go to the NRC people on the construction site. (Transcript 69).

Based on the foregoing and considering the record taken as a whole, I find that the Claimant has produced sufficient evidence to show that he was demoted, at least in part, because he engaged in a statutorily protected activity.

Under the *Mt. Healthy* analysis, once a Claimant proves that he suffered an adverse personnel action because he engaged in a statutorily protected activity, the burden shifts to the employer to show by a preponderance of the evidence that the same decision would have been made even in the absence of the protected conduct. Mr. Douglas Campbell, who became the Claimant's supervisor just three weeks before Mr. Francis was demoted, (Transcript 240), testified that he made

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the demotion decision. (Transcript 223). He stated the decision was based on "productivity, continuing or solving problems that were arising and holding test packages, observation or knowing where his technicians were, working close in band

with his technicians, coordination with the coordinators and the start-up engineers." (Transcript 204). Mr. Campbell admitted that he performed no written analysis comparing the productivity of different supervisors' crews (Transcript 212), and in fact, performed no written analysis at all of the productivity of claimant's crew; his testimony indicated that he assessed productivity based on his experience in the industry. (Transcript 221). Considering the safety concerns surrounding the construction of nuclear power plants, it is difficult to believe that instrumentation and control supervisors are demoted based on the impressionistic evaluation of a new work coordinator. In any case, I give Mr. Campbell's testimony little weight. His willingness to deviate from procedure (Transcript 210, 235) is inconsistent with the company's policy of following established procedure (Transcript 20; Exhibit C-3); his testimony that he warned Mr. Francis about his low productivity (Transcript 205) conflicts with the Claimant's testimony (Transcript 70, 109, 110); and his testimony that he made the decision to demote the Claimant (Transcript 223) conflicts with the testimony of Robert Class (Transcript 244). These contradictions, together with the witness' demeanor, lead me to conclude that Mr. Campbell's testimony is not credible.

Mr. Robert Class, a Bogan senior representative on the Hope Creek site, (Transcript 242), stated that he made the decision to demote Mr. Francis. (Transcript 244). Mr. Class had been I & C coordinator on the day shift until August 8, 1985, when he became site project manager. (Transcript 247). Mr. Class specifically denied that Bogan's action was motivated by the Claimant's intention to take his concerns to the SAFETEAM or the NRC. (Transcript 246). Mr. Class stated he talked with Campbell (Transcript 248) and Davis (Transcript 257, 258) about Francis' crew's work, but Davis denied having any such conversation. (Transcript 264). Mr. Class' testimony also conflicts with that of Mr. Davis in that Mr. Davis stated that the Claimant's crew's productivity was not "low or below standard." (Transcript 135). Mr. Davis, who assigned work to Mr. Francis' crew, was asked "Do you have any reason to believe that the productivity of [Claimant's] crew was, at any time, below that of any crew on the night shift?" Mr. Davis

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responded "No, I don't." (Transcript 133). Mr. Davis was also asked "Do you believe, based on having been on the night shift from May of 1985 to August 1985, and having direct contact with Al, having reviewed his work, if there was any justification for him being demoted because of low productivity?" Mr. Davis responded "None to my knowledge." (Transcript 135). Mr. Campbell admitted that "most of the time" Mr. Davis would have "substantial knowledge of what work was being done on the night shift." (Transcript 209).

From a consideration of all the evidence, giving particular consideration to the inconsistencies in the testimony of Bogan management and the demeanor and manner of the witnesses, I find that the employer's proffered justification for demoting Al Francis is a pretext; Mr. Francis was demoted because he engaged in a statutorily protected activity,

and the demotion would not have occurred in the absence of that activity. Mr. Francis is therefore entitled to compensation.

DAMAGES

Mr. Francis seeks back pay, reinstatement to his former position as a supervisor, and reasonable costs and attorneys' fees. Because the Claimant was unlawfully demoted, he is entitled to the difference between his pay as a supervisor and his pay as a technician. Mr. Francis agrees that he should receive the pay of a night shift technician (Transcript 76).

The following table shows the weekly wages of night shift supervisors and night shift technicians at the Hope Creek site:

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Technician

\$22.74 per hour X 40 hours	=	\$909.60
\$22.74 per hour X 20 hours		
at time and one-half	=	682.20
Total		1,591.80

Supervisor

\$24.46 per hour X 40 hours	=	\$978.40
\$24.46 per hour X 20 hours		
at time and one-half		733.80
\$24.46 per hour X 12 hours		
at double time		597.04
Total		2,399.24

The differential between the compensation of a supervisor and a technician is therefore \$707.44 per week.

Mr. Francis is therefore entitled to \$707.44 for each week that he would have been employed as a supervisor rather than a technician if he had not been demoted unlawfully. In August 1985, Mr. Francis considered asking to be relieved of his supervisory duties. He discussed this intention with Mr. Davis. (Transcript 104). Mr. Francis stated that he was considering stepping down voluntarily because of "the pressure to do the work." (Transcript 107). Mr. Francis also stated that he wanted to step down because he had to attend to business matters in Virginia. (Transcript 272). Mr. Davis also told Mr. Bob Class "You know, if you had just waited a week or two, Al was going to ask you to go back as a technician, and step down from the supervisor's position." (Transcript 258).

Because I find that Mr. Francis would have voluntarily left his supervisory post, he is not entitled to reinstatement; such a remedy on these facts would constitute an unjust result. Although the Claimant did not indicate when he would have asked to be relieved of his supervisory duties, Mr. Davis believed Mr. Francis would have stepped down only

one to two weeks after the date of his actual demotion. (Transcript 258). Moreover, Mr. Francis was demoted because of his determination to go to the NRC to get action on the MCC problem - a problem that was rectified two to three weeks after the SAFETEAM and the NRC were contacted. (Transcript 46). Based on the foregoing, and considering the record taken as a whole, I find that the Claimant is entitled to the difference between his pay as a night shift supervisor and his pay as a night shift technician for two weeks. That is, Mr. Francis is entitled to the sum of ,414.88.

In addition, Mr. Francis is entitled to

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reasonable attorney's fees under the Act. 42 U.S.C. Section 5851 (b)(2)(B). No award of attorney's fees is made herein because no application has been received from counsel. Counsel may submit such an application, and a reasonable counsel fee will be set in a supplemental decision and order.

ORDER

Based on the foregoing, and considering the evidence taken as a whole, I find that Bogan Inc. unlawfully demoted Mr. Albert L. Francis from supervisor to technician because he was about to commence or cause to be commenced a proceeding with the Nuclear Regulatory Commission.

IT IS HEREBY ORDERED that:

1. Bogan, Inc." pay to Mr. Francis the sum of ,414-88.
2. Bogan, Inc., pay to Mr. Francis a reasonable counsel fee to be set in a supplemental decision and order.

Paul H. Teitler
Administrative Law Judge

Dated:

Philadelphia, PA

NOTICE: Pursuant to 29 C.F.R Section 24.6(a) this recommended decision shall be forwarded, along with the record, to the Secretary of Labor for a final order.

[ENDNOTES]

¹ Hereinafter referred to as NRC.

² A system's deficiency report (SDR) "identifies the problem or a deficiency, something that is not adequate, something that has been installed wrong or is just not adequate to do the job. And, working from that, the start-up crew can make repairs, revisions, whatever is necessary." (Transcript 41). An SDR is a necessary prerequisite in order to correct and rectify a deficiency. (Transcript 41).